U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

April 13, 2015

TO: Members, Subcommittee on Oversight and Investigations

FROM: Committee Majority Staff

RE: Hearing entitled "Unlawful Reinsurance Payments: CMS Diverting $3.5 Billion from Taxpayers to Pay Insurance Companies."

On April 15, 2016, at 9:30 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing entitled "Unlawful Reinsurance Payments: CMS Diverting $3.5 Billion from Taxpayers to Pay Insurance Companies."

Section 1341 of the Patient Protection and Affordable Care Act (PPACA) established the transitional reinsurance program, a risk mitigation program for health insurers. Under this program, the Centers for Medicare and Medicaid Services (CMS) collects contributions from health insurers, and then uses those contributions to make reinsurance payments to health insurers who enroll high-risk individuals. Notably, PPACA also requires that a portion of the contributions for the reinsurance program be deposited to the U.S. Treasury. The statute specifically states that a portion of the contributions "shall be deposited into the general fund of the Treasury of the United States and may not be used for the [reinsurance] program."[1] Despite the plain text of the law, CMS has been diverting billions of dollars intended for the U.S. Treasury to insurance companies as reinsurance payments. The Subcommittee is conducting oversight to understand why CMS is diverting billions to the health insurers.

I. WITNESS

- Andy Slavitt, Acting Administrator, Centers for Medicare and Medicaid Services

II. BACKGROUND

The Patient Protection and Affordable Care Act requires health insurance companies to provide coverage to individuals regardless of the individuals' health status, medical history, or pre-existing conditions. To mitigate the financial risk caused by this broad requirement, the PPACA also created three programs: the permanent risk adjustment program; temporary risk corridors program; and the temporary transitional reinsurance program. These programs are commonly referred to as the "three Rs."

[1] 42 U.S.C § 18061(b)(4).

Permanent Risk Adjustment Program:

This program is intended to mitigate the effects of "adverse selection."[2] Adverse selection occurs when individuals who are in the most need of health care services may be more likely to enroll in more generous—and therefore expensive—plans, while individuals who do not expect to need as much health care services enroll in less generous—and therefore cheaper—plans.[3] The permanent risk adjustment program transfers funds from lower risk plans to higher risk plans based on average actuarial risk.[4]

Temporary Risk Corridors Program:

This temporary program is supposed to protect against inaccurate premiums by sharing risk in the first three years of the PPACA rollout (2014–2016).[5] CMS collects funds from Qualified Health Plans (QHPs) with lower than expected claims and makes payments to QHPs with higher than expected claims.[6]

Transitional Reinsurance Program:

This temporary program is intended to help stabilize individual market premiums during the first three years of the ACA rollout (2014–2016).[7] CMS collects contributions from health insurers for the program.[8] CMS regulations control the contribution amounts, and health insurers use this information to help set their premium rates. From the fund created by the contributions, CMS makes reinsurance payments to insurers who enroll high-risk individuals. CMS is required by law to contribute a portion to the U.S. Treasury and a portion to help cover administrative costs.

III. TRANSITIONAL REINSURANCE PROGRAM

Under section 1341 of PPACA, a portion of the contributions collected for the transitional reinsurance program is supposed to be deposited to the U.S. Treasury. The statute provides:

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[2] Memorandum to the Committee on Energy and Commerce, "Information on the ACA Transitional Reinsurance Program," (Feb. 23, 2016) (on file with Committee).
[3] *Id*.
[4] Explaining Health Care Reform: Risk Adjustment, Reinsurance, and Risk Corridors, Jan. 22, 2014, http://kff.org/health-reform/issue-brief/explaining-health-care-reform-risk-adjustment-reinsurance-and-risk-corridors/ (last visited April 5, 2016).
[5] *Id.*
[6] *Id*.
[7] *Id*.
[8] The transitional reinsurance program collects contributions from contributing entities to fund reinsurance payments. A contributing entity means a health insurance issuer or a self-insured group health plan. "The Transitional Reinsurance Program – Reinsurance Contributions," Center for Consumer Information & Insurance Oversight, Centers for Medicare and Medicaid Services, https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/The-Transitional-Reinsurance-Program/Reinsurance-Contributions.html (last visited April 11, 2016).

> [A]ny contribution amounts described in paragraph (3)(B)(iv) [the U.S. Treasury contribution] shall be deposited into the general fund of the Treasury of the United States and may not be used for the program established under this section.[9]

Initially, the Department of Health and Human Services (HHS) obeyed the statute. According to HHS' final rule issued on March 11, 2014, and similar to its 2013 rule, CMS planned to allocate contributions to the reinsurance program among the health insurers, the U.S. Treasury, and administrative costs.[10] The final rule also contemplated what would happen if CMS collected less than the statutory guidelines. CMS set out in its final rule that if "the total amount of contributions collected is *less than* or equal to $8.025 billion, we will allocate approximately . . . 24.9 percent of the reinsurance contributions collected to the U.S. Treasury."[11]

Ten days later on March 21, 2014, however, the Administration issued a different proposed rule, completely reversing course. Contrary to its March 11, 2014 final rule, HHS' March 21, 2014 proposed rule prioritized contributions to the health insurers.[12] The proposed rule stated:

> Due to the uncertainty in our estimates of reinsurance contributions to be collected, and to help assure that the reinsurance payment pool is sufficient to provide the premium stabilization intended by the statute, we propose to revise our allocation of reinsurance contributions collected and adopt a similar prioritization in the event that reinsurance collections fall short of our estimates. Specifically, if collections fall short of our estimates for a particular benefit year, we propose to alter the allocation so that the reinsurance contributions that are collected are allocated first to the reinsurance pool and administrative expenses, and are allocated to the U.S. Treasury once the targets for reinsurance payments and administrative expenses are met.[13]

CMS further stated that it would allocate the first $10 billion received in 2014 to insurers before allocating any funds to the U.S. Treasury or for administrative costs. CMS finalized this rule on May 27, 2014, confirming its proposed rule.[14] The timeline below highlights how CMS changed its policy from allocating contributions to prioritizing contributions to health insurers:

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[9] 42 U.S.C. § 18061(b)(4).
[10] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015; Final Rule, 79 Fed. Reg. 13744, 1376–77 (Mar. 11, 2014).
[11] *Id*. at 13777 (emphasis added).
[12] Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond; Proposed Rule, 79 Fed. Reg. 15808, 15820–21 (Mar. 21, 2014).
[13] *Id*.
[14] Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond; Final Rule, 79 Fed. Reg. 30240, 30252 (May 27, 2014).

Transitional Reinsurance Program Rulemaking Timeline

March 23, 2011: The Patient Protection and Affordable Care Act passed. Section 1341 established the *transitional reinsurance program*. The law stated, in part, that a portion of the reinsurance contributions from the health insurers shall be deposited into the U.S. Treasury.[15]

March 11, 2013: HHS issued a final rule, entitled "HHS Notice of Benefits and Payment Parameters for 2014." This rule allocated contributions to the reinsurance program among the health insurers, the U.S. Treasury, and administrative costs.[16]

Dec. 2, 2013: HHS released its proposed rule, entitled "HHS Notice of Benefits and Payment Parameters for 2015." In this rule, HHS allocated contributions to the reinsurance program among health insurers, the U.S. Treasury, and administrative costs.[17]

March 11, 2014: HHS issued its final rule, entitled "HHS Notice of Benefits and Payment Parameters for 2015." This rule allocated contributions to the reinsurance program among the health insurers, the U.S. Treasury, and administrative costs. The final rule also stated that the U.S. Treasury would be allocated funds proportionally even if actual contribution collections were below $8.025 billion (the targeted amount plus administrative costs in statute).[18]

March 21, 2014: HHS issued its proposed rule, entitled "Exchange and Insurance Market Standards for 2015 and Beyond." In this rule, HHS reversed course on how contributions to the reinsurance program are allocated. In this proposed rule, HHS stated it would allocate the first $10 billion received in 2014 for reinsurance payments to insurers.[19]

May 27, 2014: HHS issued its final rule, entitled "Exchange and Insurance Market Standards for 2015 and Beyond." HHS affirmed its reversal in its March 21 proposal, stating "we finalize our allocation proposal, with one modification, so that, in the event of a shortfall in our collections, reinsurance contributions will first be allocated to the reinsurance payment pool, and second to administrative expenses and the U.S. Treasury."[20]

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[15] 42 U.S.C. § 18061(b)(4).
[16] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014; Final Rule, 78 Fed. Reg. 15459-15460 (Mar. 11, 2013).
[17] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015; Proposed Rule, 78 Fed. Reg. 72322, 72342–43 (Dec. 2, 2013).
[18] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015; Final Rule, 79 Fed. Reg. 13744, 13776–77 (Mar. 11, 2014).
[19] Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond; Proposed Rule, 79 Fed. Reg. 15808, 15820–21 (Mar. 21, 2014).
[20] Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond; Final Rule, 79 Fed. Reg. 30240, 30252 (May 27, 2014).

CMS issued payments in 2015 for the 2014 benefit year based on the methodology in the "Exchange and Insurance Market Standard for 2015 and Beyond" final rule. Further, CMS has already issued early partial reinsurance payments this year for the 2015 benefit year. The U.S. Treasury has not received any reinsurance payments to date.

IV. CRS MEMORANDUM

In February 2016, the non-partisan Congressional Research Service (CRS) issued a memorandum, which addressed, in part, whether CMS has the authority to prioritize reinsurance payments to health insurers over the U.S. Treasury.[21] First, CRS wrote, although the statute does not speak to the timing of the deposits to the U.S. Treasury, the "miscellaneous receipts statute" requires the federal government to deposit money it receives "as soon as practicable" into the U.S. Treasury.[22] CRS did find that the CMS had the statutory authority to retain certain contributions as an exception to the "miscellaneous receipts statute."[23] CRS determined, however, that CMS' authority to retain and use these contributions is significantly qualified.[24] CRS pointed to the following provision:

> [A]ny contribution amounts described in paragraph (3)(B)(iv) [the U.S. Treasury contribution] *shall* be deposited into the general fund of the Treasury of the United States and *may not be used* for the program established under this section.[25]

Based on the language of the statute, CRS determined that CMS is only permitted to retain and use that part of each insurer's contribution that is attributable to (1) the reinsurance program, and (2) administrative expenses, but <u>not</u> the portion that is attributable to (3) the U.S. Treasury.[26]

CRS then examined what portion of each insurer's contribution is attributable to which category. Under CMS' current interpretation, no portion of an insurer's contribution is "attributable to the U.S. Treasury contribution until the aggregate amount collected meets the aggregate target for reinsurance payments."[27] CRS found, however, that the "statute appears to speak directly to the question of whether the U.S. Treasury contribution must be taken from each issuer's contribution." CRS concluded:

> [I]nsofar as CMS' interpretation allows the entire contribution of an issuer in any given year to be used only for reinsurance payments, such that no part of it is allocated for the U.S. Treasury contribution, then that would appear to be in conflict with a plain reading of § 1341(b)(4). Because the statute unambiguously

[21] Memorandum to the Committee on Energy and Commerce, "Information on the ACA Transitional Reinsurance Program," (Feb. 23, 2016) (on file with Committee).
[22] *Id*. *See also*, 31 U.S.C. § 3302(b).
[23] *Id*.
[24] *Id*.
[25] 42 U.S.C. § 18061(b)(4) (emphasis added).
[26] Memorandum to the Committee on Energy and Commerce, "Information on the ACA Transitional Reinsurance Program," (Feb. 23, 2016) (on file with Committee).
[27] *Id*.

> states that 'each issuer's contribution' contain an amount that reflects 'its proportionate share' of the U.S. Treasury contribution, and that these amounts should be deposited in the General Fund of the U.S. Treasury, a contrary agency interpretation would not be entitled to deference under *Chevron*.[28]

CRS determined that, because the statute is not ambiguous, it appears that CMS' actions contradict the plain language of the law, suggesting that the Agency's action would not receive deference if it were challenged in court.

V. ISSUES

The following issues are expected to be examined at the hearing:

- What is CMS' legal position on whether or not the law requires a portion of the reinsurance contributions be allocated to the U.S. Treasury?

- Why did CMS change its position from allocating reinsurance contributions between the health insurers, the U.S. Treasury, and administrative costs to prioritizing reinsurance contributions to the health insurers?

- What is CMS' position on CRS' memorandum discussing the legality of prioritizing reinsurance payments to health insurers?

VI. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Jessica Donlon, Emily Felder, or Brittany Havens of the Committee staff at (202) 225-2927.

[28] *Id.*